No. 186

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1951.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

vs.

ROANE-ANDERSON COMPANY,
Respondent.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

vs.

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee, entered in the above entitled consolidated cases on March 9, 1951.

OPINIONS BELOW.

These cases were consolidated for trial in the Chancery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (Rec. 50). This opinion is not reported. Three

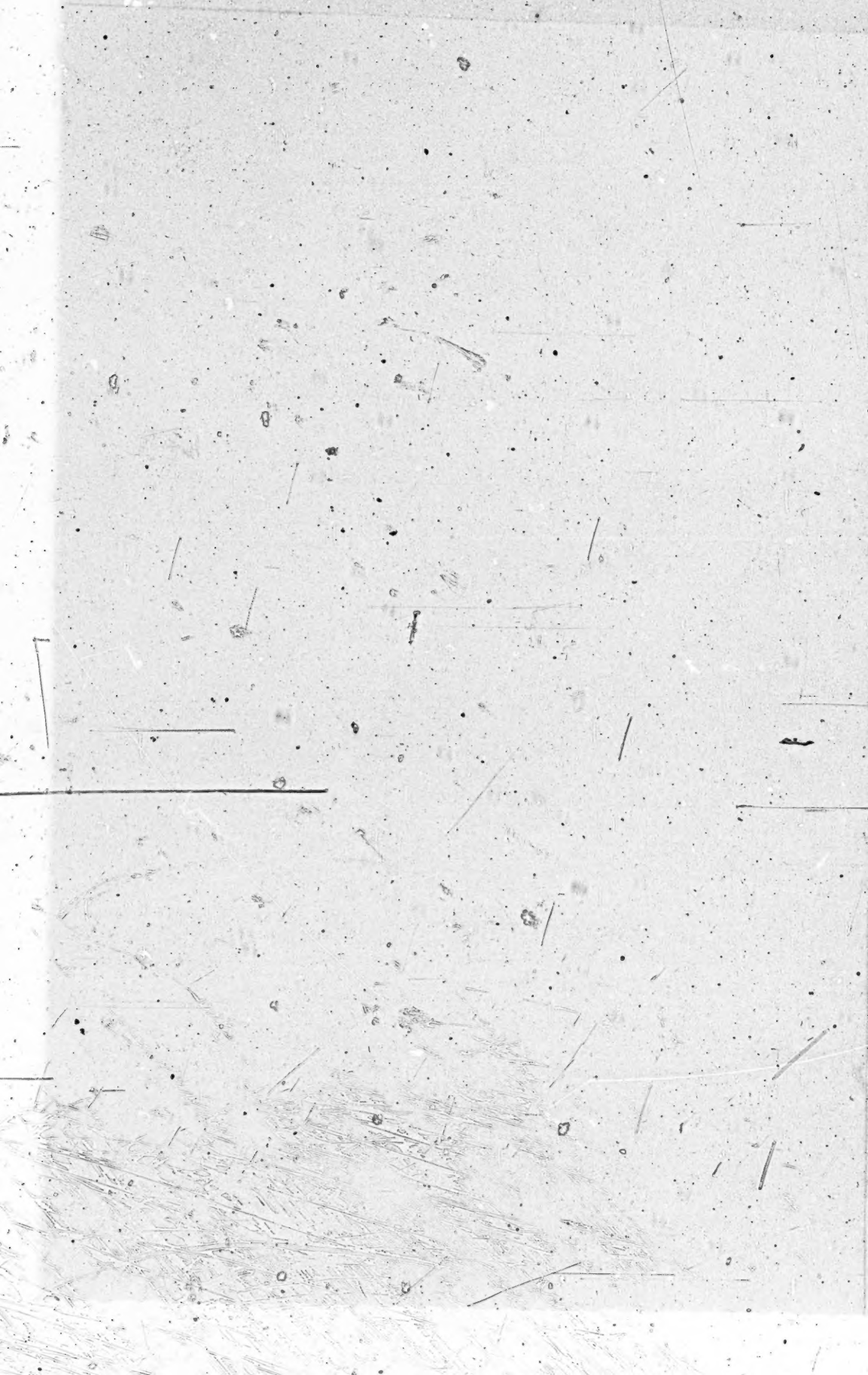
opinions were filed by the Supreme Court of Tennessee: a majority opinion, a concurring opinion, and a dissenting opinion, the latter being filed by two of the five Justices who comprise that court (Rec. 7, 24, 26). These opinions are reported in 239 S. W. (2d) 27.

JURISDICTION.

The judgment of the Supreme Court of Tennessee was entered on March 9, 1951 (Rec. 2, 3). The jurisdiction of this court is invoked under 28 U. S. C., Section 1257 (3).

The federal question sought to be reviewed was raised by the original bills filed by the respondents, as complainants, in the Chancery Court for Davidson County, at Nashville, Tennessee (Rec. 31-88). The allegations of the two original bills, raising the federal question, are practically identical. The allegation in the original bill in the case of Roane-Anderson Company v. Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, is as follows:

> "Complainant particularly desires to call to the attention of the Court the provisions of Section 9 (b) of the Atomic Energy Act of 1946 reading as follows:
>
> > 'In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commisssion shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired,



except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, County, Municipality, or any subdivision thereof.'

"The complainant alleges that all of its transactions and all of its acts entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9 (b) of the Atomic Energy Act of 1946, and that if the Tennessee Retailer's Sales Tax Act is construed as being applicable to the activities or transactions which are herein questioned that Act is invalid as applied because it is repugnant to the Atomic Energy Act of 1946 including Section 9 (b) thereof and if construed as applicable to the activities or transactions as above mentioned is invalid as applied because it is repugnant to the Constitution of the United States."

(Excerpt from original bill in Roane-Anderson Company case, Rec. 36.)

Petitioner's answers to the original bills denied the claimed immunity; thus issue was joined on the federal question (Rec. 43, 101).

Since these cases involve state revenue they went, on appeal, directly to the Supreme Court of Tennessee (Section 10618, Code of Tennessee). The federal question raised by the original bills and the answers thereto was

recognized by the Supreme Court of Tennessee as being determinative of the consolidated cases. This is stated in all three opinions on file (Rec. 8, 17, 24, 26, 30).

In the majority opinion it is said:

> "There are numerous assignments of error. As a whole, though, these assignments go to the finding or the failure of the chancellor to find facts according to the contention of the appellants. There are two contentions made by the appellants, both of which were answered contrary to their contention by the chancellor, either of which if answered in the affirmative would sustain the suits in these cases. These contentions are: (1) That the Tennessee Sales Tax Statute as applied to purchases and procurements herein is invalid and an infringement of the Federal Constitutional immunity of the means and instrumentalities employed by the United States to carry on its functions, and (2) that if there is no implied Federal Constitutional immunity under the facts developed in this case, that then under the terms of Section 9 (b) of the Atomic Energy Act, creating this Federal agency, that Congress has exempted the property, income and activities of the Commission from State or local taxation 'in any manner or form'" (Rec. 8).

After thus stating the issues the Supreme Court of Tennessee found the respondent Roane-Anderson Company to be an independent contractor with the Atomic Energy Commission. With respect to the second "contention," the majority opinion says:

> "The second contention has given us far greater concern than the first and, as we view it, it is the question in the lawsuit" (Rec. 17).
>
> "We are therefore of the opinion that in view of this congressional legislation the taxes in question are invalid as an unconstitutional intrusion by the State upon the performance of Federal functions. The cases

are therefore reversed and a judgment will be entered here for the refund of the taxes sued for. The taxes fall directly upon activities which the Commission is carrying on through its cost reimbursement contractors. The exemption in Section 9 (b) of the Act was intended to protect such activities" (Rec. 23).

It is not anticipated that respondents will make any insistence that this court does not have jurisdiction under U. S. C., Sec. 1257 (3), to grant the petition as prayed, should the court be of opinion that said petition should in the public interest be granted.

QUESTION PRESENTED.

Chapter 3 of the Public Acts of the General Assembly for Tennessee for the year 1947 levies a general nondiscriminatory sales and use tax upon vendors selling tangible personal property at retail in Tennessee, and on those who use, store for use, distribute or consume tangible personal property in Tennessee, at the rate of 2% of the "sale price" or "cost," as defined by the act [Chap. 3, Public Acts of 1947, Sections 2 (d), 2 (e), 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.23, 1328.24 and 1328.25].

The sales tax provisions of said act have been construed by the Supreme Court of Tennessee, the Tennessee court of last resort, as levying a privilege tax upon the vendor for the privilege of engaging in the business of making retail sales.

(Hooten v. Carson, 186 Tenn. 282, 283, 209 S. W. [2d] 273; Chap. 3, Public Acts of 1947, Section 3; Williams' Tennessee Code Anpotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sec. 1328.24.)

The use tax feature of said act is similar to that of all other states having a general nondiscriminatory sales tax and complimentary use tax. It levies a tax upon the privi-

lege of using, distributing or storing tangible personal property in Tennessee, after it has been brought into Tennessee and has become a part of the mass of the property in the state (Chap. 3, Acts of 1947, Sections 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.24 and 1328.25). Credit is allowed on the use tax of sales tax paid on such tangible personal property at the point of acquisition (Chap. 3, Acts of 1947, Sec. 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supp., Vol. 2, Sec. 1328.25).

Section 9 (b) of the Atomic Energy Act of 1946, 42 U. S. C. A., 1951 Supplement, Section 1809-(b), provides, in part, as follows:

> "The Commission, and the property, activities and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality or any subdivision thereof."

Respondent Roane-Anderson Company is an independent contractor operating under a contract with the Atomic Energy Commission at Oak Ridge, Tennessee, using tangible personal property in discharging said contract (Rec. 9, 16, 31, 39, 51, 69, 76, 84).

Respondent Wilson-Weesner-Wilkinson Company is a Tennessee vendor, who sold tangible personal property to said contractor for use in discharging said contract (Rec. 88, 91, 100).

The question presented is whether said Section 9 (b) of the Atomic Energy Act is subject to the construction placed on it by the Supreme Court of Tennessee: That it operates to exempt from sales taxation vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission; and, that said Section 9 (b) prevents the State of Tennessee from levying a use

tax upon the "use" of tangible personal property by such contractors in discharging their contracts with the Atomic Energy Commission.

THE STATUTE INVOLVED.

The pertinent statutory provisions are printed in Appendix A, infra, p. 47.

STATEMENT.

History of Cases.

Four suits were commenced by contractors with the Atomic Energy Commission at Oak Ridge, Tennessee, and their suppliers, in the Chancery Court for Davidson County at Nashville, Tennessee. These four suits were:

Carbide and Carbon Chemicals Corporation, hereinafter referred to as Carbide, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the first suit, which was Rule Docket No. 65,014, in the Chancery Court for Davidson County, for the purpose of testing the "use" tax.

Roane-Anderson Company, hereinafter referred to as Roane-Anderson, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the second suit, Rule Docket No. 65,015, in the Chancery Court of Davidson County, to test whether the "use" tax applied to it, its contract being in some regards different from that of Carbide.

Diamond Coal Mining Company, a Tennessee vendor, and Carbide brought the third suit, being Rule Docket No. 65,163 in said chancery court, to test the "sales" tax.

Wilson-Weesner-Wilkinson Company and Roane-Anderson brought the fourth suit, which was Rule Docket No. 65,164 in said chancery court, to test the "sales" tax.

The first and third cases, both involving Carbide and its contract, were consolidated so far as the evidence was concerned, and one transcript was filed in the Chancery Court for Davidson County and in the Supreme Court of Tennessee for both cases. For the same reasons, the second and fourth cases were consolidated and but one transcript was filed in said consolidated cases in the Chancery Court for Davidson County and in the Supreme Court of Tennessee.

After the cases were consolidated, and after the taking of depositions, leave was granted the United States to file its intervening petitions, which adopted all of the allegations and conclusions contained in the original bill and concurred in the prayers thereof (Rec. 47, 105).

While the cases were pending in the chancery court, Sam K. Carson resigned as Commissioner of Finance and Taxation of Tennessee and an order was entered substituting James Clarence Evans, who was appointed Commissioner of Finance and Taxation, as defendant; in his place. According to the practice in Tennessee, the styles of the cases were not changed but remained as they had been at the time of the filing of the original bill (Rec. 46, 104).

The decrees of the chancery court were in favor of petitioner on all issues and respondents appealed (Rec. 85, 107).

The majority opinion of the Supreme Court was in favor of respondents on the issue made on the federal question, although it was in favor of the petitioner on the other issues.

Inasmuch as the decision of the federal question in favor of the claimed immunity prevents the State of Tennessee from collecting sales and use taxes which it deems the respondents liable for, the petitioner files this present petition.

The chancellor disposed of the consolidated cases with a single opinion (Rec. 50). The Supreme Court of Tennessee has done likewise (Rec. 7). Except, that one concurring and one dissenting opinion have been filed (Rec. 24, 26).

The contracts have been certified in the original form in which filed in the court below.

The Facts.

Respondent Roane-Anderson is a private profit type Tennessee corporation, and a cost-plus-fixed-fee contractor with the United States Atomic Energy Commission operating under contract W-7401-eng-115, at Oak Ridge, Tennessee (Rec. 16, 31, 39, 51, 69, 76, 84). Respondent Wilson-Weesner-Wilkinson Company is a private profit type Delaware Corporation domesticated in Tennessee, and is a commercial firm which sold items of tangible personal property to Roane-Anderson for use by the latter in performance of said contract with the Atomic Energy Commission (Rec. 88, 91, 100).

Respondent Roane-Anderson entered into a contract with the United States of America on November 23, 1943, as an incident to the prosecution of World War II then in progress. The contract was designated by the parties as contract W-7401-eng-115. Said contract was entered into pursuant to the War Powers Act, Public Law 354, 77th Congress. Respondent Roane-Anderson entered upon the performance of the contract and has been engaged therein ever since (Rec. 32, 40).

The contract and the amendments thereto through June 30, 1948, are Exhibits 1, 2 and 27 to the record (Rec. 32).

The Act of Congress of August 2, 1946 (Public Law 585, 79th Congress, 42 U. S. C. A. 1801 et seq.), known as the Atomic Energy Act of 1946, duly provides for the transfer of the Atomic Energy Commission of all properties, re-

sponsibilities, duties, rights, etc., from the Government's agency, the Manhattan Engineer District of the United States Army Engineers, which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which respondent Roane-Anderson then and now maintains offices and carry on its work under said contract (Rec. 32, 40, 69, 84).

Pursuant to the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission and respondent Roane-Anderson, as of midnight December 31, 1946.

As a necessary and integral part of the work under said contracts, respondent Roane-Anderson Company purchased tangible personal property of the kind described as taxable under the Tennessee Retailers' Sales Tax Act of 1947 (Rec. 33, 41, 70, 84).

Respondent Roane-Anderson has paid the Tennessee use taxes on the purchase of property for use under its contract with the Commission and described as being subject to the use tax under statute (R. 33, 34, 41). It has also paid as a part of the purchase price of tangible personal property amounts equal to the tax levied against vendors of such property for the privilege of engaging in the business of making sales thereof in Tennessee (R. 53, 61, 71, 84). On October 15, 1947, Roane-Anderson paid petitioner Sam K. Carson, then Commissioner of Finance and Taxation of Tennessee, $1,264.98, which sum was claimed by said petitioner to be payable as the use tax on purchases by respondent Roane-Anderson from out-of-state vendors for use under its contract with the Commission for the month of September, 1947 (R. 33, 34, 41). Said tax was paid

under protest and involuntarily and suit to recover same was begun within the time provided by law (R. 31, 41). During November, 1947, respondent Wilson-Weesner-Wilkinson Company in the course of business sold to respondent Roane-Anderson certain items of personal property for a total sales price of $5,705.55, which price included the sum of $111.87, required to be added as a part of the sales price of said items of personal property by the Tennessee Retailer's Sales Tax Act. The sales transaction taking place in Tennessee, when respondent Wilson-Weesner-Wilkinson Company paid the tax provided by the Sales Tax Act on its gross sales in Tennessee, it paid $111.87 as a tax for the privilege of engaging in the business of making sales of tangible personal property to respondent Roane-Anderson. This amount was paid under protest and involuntarily on December 19, 1947, and suit to recover the same was commenced within the time prescribed by law (Rec. 53, 61, 71, 84).

All of the property purchased by respondent Roane-Anderson asserted to be taxable was purchased solely for use under its contract with the Commission (Rec. 33, 41).

By said contract W-7401-eng-113, as amended, respondent Roane-Anderson contracted to and has operated for the Atomic Energy Commission the town bus transportation systems, cafeterias, dormitories and the hospital, all of which are government-owned. The said respondent manages the government-owned housing facilities in Oak Ridge, Tennessee, maintains the roads and streets and utilities systems, including electricity, water and sewage disposal plant, and obtains concessionaires to operate businesses or commercial enterprises in Oak Ridge, Tennessee, using government-owned facilities (Rec. 62, 72, 73, 84, 123, 167, 168, 172, 173).

Roane-Anderson also performs certain maintenance and repair services on other government-owned buildings and properties (Rec.—see above).

The question whether, under this contract, the sale of tangible personal property to, and the use of the same by, respondent Roane-Anderson are exempt from taxation under the implication of the Constitution of the United States, was a bitterly contested issue. Both the chancellor (Rec. 54) and the Supreme Court of Tennessee (Rec. 8, 17, 23) have held, upon a consideration of the contracts and all of the evidence produced by respondent, that the sales and use transactions are not entiled to exemption from taxation on the implied immunity doctrine.

Much of the record is taken up with proof, in detail, of the manner in which articles of tangible personal property are purchased and used by respondent contractor. This proof was placed in the record by respondents in support of their contention that the sales and use transactions are exempted from taxation by operation of the doctrine of implied constitutional immunity. As stated, the Supreme Court of Tennessee has refused to sold that these transactions are exempt from sales and use taxation under this doctrine and has held that the same are exempt from taxation solely because of Section 9 (b) of the Atomic Energy Act.

Upon this issue, the Supreme Court of Tennessee and the chancery court, the court of original jurisdiction, have concurred, both courts finding expressly and by implication as a matter of fact, under Tennessee law, respondent contractor is an independent contractor and that on the facts and circumstances of the cases, the sales transactions and use of property would be taxable except the Supreme Court of Tennessee finds Section 9 (b) exempts from taxation.

In consideration of these holdings by the Tennessee Courts, petitioner does not deem it necessary or proper to burden the court with a recitation of the proof taken by respondent which deals with the methods by which tangi-

ble personal property was acquired by respondent contractor for use under the contract.

A part of the record consists of proof by respondents with respect to the manner in which respondent is reimbursed by the Atomic Energy Commission for expenditures made under the contract, and proof of the methods by which advancements are made to the contractor and accounted for by it. Like the other proof just referred to, this proof was directed at the issue of immunity on account of the doctrine of implied constitutional immunity from taxation and, since this doctrine has been rejected by both the Tennessee courts as not applicable under the facts, and since the decision of the case has been placed squarely on the construction of the federal statute involved, no further reference will be made to this proof.

Petitioner submits that there is no non-federal ground, on which the decision of the Supreme Court of Tennessee is based, in any part, adequate to support the judgment in these consolidated cases.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U. S. C. A., 1951 Supplement, Section 1809-(b), exempts from sales taxation by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947 vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission.

2. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U. S. C. A., 1951 Supplement, Section 1809-(b), exempts respondent contractors from the use tax, levied by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, upon the "use" of tangible personal property by respondent contractors in discharging their contracts with the Atomic Energy Commission.

REASONS FOR GRANTING THE WRIT.

As matters now stand with respect to the proper interpretation of Section 9 (b), we have: (1) an opinion by the Chancery Court holding that said Section 9 (b) does not exempt the "sale" or "use" of tangible personal property from sales and use taxation when sold to or used by a contractor with the Atomic Energy Commission. (2) A majority opinion by three of the five Justices of the Supreme Court of Tennessee, holding that said Section 9 (b) does so exempt such sale and use of tangible personal property. (3) A dissenting opinion by the two remaining members of the Supreme Court of Tennessee, who agree with the chancellor, and hold that said Section 9 (b) does not exempt as claimed by respondents.

While it is recognized that this is not the character of conflict in decisions that ordinarily furnishes a basis for the granting of the writ of certiorari, still this situation does make it appear that the proper construction of said Section 9 (b) is not easily arrived at and that a final interpretation of the statute should be made by this Honorable Supreme Court of the United States.

Clearly, the question presented is one of the utmost importance to many of the States of the Union. This court will take judicial notice that the Atomic Energy Commission is presently operating on a very large scale in Tennessee and Washington. At Los Alamos, New Mexico, the Atomic Energy Commission has carried on a considerable research and development program. In addition to the projects at Oak Ridge, Tennessee, Hanford, Washington, and Los Alamos, New Mexico, the Atomic Energy Commission carries on work in California, where it works through the University of California and certain laboratories in that state; New York, where the Commission has contracts with Columbia University; Memorial Hospital

and Sloan Kettering Institute; Wisconsin, where the Commission has contracts with the University of Wisconsin; Massachusetts, where the Commission has contracts with the Massachusetts Institute of Technology and Harvard University; New Jersey, where the Commission has contracts with Sylvania Electric Company; Illinois, where the Commission has contracts with the Illinois Institute of Technology and the Argonne National Laboratory at Chicago; the National Laboratory operated by the University of Chicago, at Chicago, Illinois; Missouri, where the Commission has contracts with Washington University in St. Louis; Colorado, where the Commission has contracts with the University of Colorado; Oregon, where the Commission has contracts with the Reed College; Ohio, where the Commission has contracts with the Battelle Memorial Institute at Columbus, Ohio; Iowa, where the Commission has contracts with the Iowa State College and Ames Laboratory.

In addition to these contracts for research and development, the Atomic Energy Commission has acquired large tracts of land and is preparing to erect enormous plants and spend millions of dollars in Kentucky, South Carolina, and Georgia.

The foregoing references to the extent of the activities of the Atomic Energy Commission in various States of the Union are not intended to be all inclusive but merely to illustrate that the extent of the exemption in Section 9 (b) is of the utmost importance and should be determined at the earliest opportunity.

The writ prayed for should be granted because the differences between the Atomic Energy Commission and the State of Tennessee, and other states, which have arisen and which will arise on account of said Section 9 (b), will amount to millions of dollars. For example, while the

amounts sued for in these consolidated cases are not large, and, to the contrary, may be said to be more or less nominal, these are test cases, and sales and use taxes in the amount of two million dollars or more are involved (Rec. 7). In other States of the Union, where the program of development is only commencing, larger amounts of taxes can and will be involved.

In conclusion petitioner prays that the writ of certiorari issue.

BRIEF AND ARGUMENT

In Support of Petition for Writ of Certiorari.

DISCUSSION OF SPECIFICATIONS OF ERROR.

Both of the errors specified stem from what the petitioner believes is an incorrect construction of Section 9 (b) of the Atomic Energy Act of 1946, and the specifications will be discussed on this basis.

The Atomic Energy Act of 1946 was enacted to provide federally for the development and control of Atomic energy in order that this new source of power might be utilized, first, in the common defense and security of the United States and, second, in improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace. (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755.)

In order to achieve these things the Atomic Energy Act provides for certain major programs. These are:

> "(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;
>
> "(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;
>
> "(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

"(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and

"(5) A program of administration which will be consistent with the foregoing policies and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."

(Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755.)

The execution of these policies is assured by a provision for the appointment of an Atomic Energy Commission, a General Manager, Divisions and Directors, the appointment of a General Advisory Committee, appointment of a Military Liaison Committee, and the appointment of Army, Navy, or Air Force officers to said Military Liaison Committee. [Aug. 1, 1946, Chap. 724, Sec. 2, 60 Stat. 756, amended July 26, 1947, Chap. 343, Title II, Sec. 205 (a), 61 Stat. 501; July 3, 1948, Chap. 828, 62 Stat. 1259; Oct. 11, 1949, Chap. 673, Sections 1-3, 63 Stat. 762; Sept. 23, 1950, Chap. 1000, Sections 1, 2, 64 Stat. 979.]

Research and development are provided for by a provision in the Act requiring the Commission to foster the same (1) by contracts with and loans to private and public institutions or persons, and (2) by providing that the Commission shall engage in research and development. (Aug. 1, 1946, Chap. 724, Sec. 3, 60 Stat. 758.)

Production of fissionable material is assured by the Act which: (1) makes the United States the exclusive owner of all facilities for the production of fissionable materials in other than experimental quantities; (2) provides that the Commission may (a) contract for the production of fissionable materials in its own facilities or (b) that the Commis-

sion may produce the material itself. (Aug. 1, 1946, Chap. 724, Sec. 4, 60 Stat. 759.)

Control of fissionable material is provided for by vesting title thereto in the Commission; regulating the distribution thereof; regulating the acquisition of such materials and facilities for production; regulating the ownership and production of source materials. (Aug. 1, 1946, Chap. 724, Sec. 5, 60 Stat. 760.)

Military application of atomic energy is provided for by authorizing the Commission: (1) to engage in research and development work in the military application of Atomic energy; (2) to engage in the production of atomic bombs, atomic bomb parts, or other military weapons. All of which is to be done only to the extent directed by the President. (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 763.)

Utilization of Atomic Energy is authorized in certain limited instances under certain stringent licensing regulations and requirements (Aug. 1, 1946, Chap. 724, Sec. 7, 60 Stat. 764).

Provision is made for the supremacy of treaty provisions over the provisions of the Atomic Energy Act in conflict therewith (August 1, 1946, Chap. 724, Sec. 8, 60 Stat. 765).

Then comes the section dealing with the property of the Commission, in which is found Section 9 (b). By this section provision is made for the transfer to the Atomic Energy Commission of all property, interests and contracts of the United States dedicated to the production of nuclear energy or experimentation therein in the hands of other agencies. Immediately following this provision with respect to the property of the commission and as a part of the same section, follows Section 9 (b) (Aug. 1, 1946, Chap. 724, Sec. 9, 60 Stat. 765). See appendix A, page 47.

The dissemination of information concerning Atomic Energy is rigidly and extensively controlled (Aug. 1, 1946, Chap. 724, Sec. 10, 60 Stat. 766).

Patents and inventions and production in military utilization are regulated and controlled (Aug. 1, 1946, Chap. 724, Sec. 11, 60 Stat. 768).

The authority, powers and duties of the Commission are defined (Aug. 1, 1946, Chap. 724, Sec. 12, 60 Stat. 770).

Compensation for acquisition of private property taken in the course of the execution of the act is provided for (Aug. 1, 1946, Chap. 724, Sec. 13, 60 Stat. 772).

Judicial review of administrative action is recognized and provision made therefor (Secs. 1001-1011 of Title 5, Aug. 1, 1946, Chap. 724, Sec. 14, 60 Stat. 772).

A Joint Congressional Committee is established and reports thereto are provided for. (Aug. 1, 1946, Chap. 724, Sec. 15, 60 Stat. 772).

Penalties, injunctions, power of subpoena and production of documents are all provided for (Aug. 1, 1946, Chap. 724, Sec. 16, 60 Stat. 773).

Certain terms of the Atomic Energy Act are defined. The word "activities" does not appear in this list (Aug. 1, 1946, Chap. 724, Sec. 18, 60 Stat. 774).

An appropriation is then made sufficient to carry out the Act (Aug. 1, 1946, Chap. 724, Sec. 19, 60 Stat. 775).

Your petitioner contends that Section 9 (b), when read in its proper context, and in the light of congressional policy as exemplified by the past actions of Congress, simply exempts the Atomic Energy Commission from any form of taxation when it undertakes to perform any of the activities in which the Act authorizes it to engage; that the exemption is extended only to the Commission

and does not include independent contractors with the Commission.

Before discussing in detail petitioner's reasons for this view, we should like to make reference to the grounds on which the majority opinion of the Supreme Court of Tennessee is based.

The majority opinion referred to is predicated upon the following grounds: (1) The exemption should be given a broad construction. The word activities is a broad word (Rec. 20). (2) Congress knew that contractors were being employed by the United States Army Engineers in the development of Atomic Energy. Provision is made in the Act for production of fissionable materials by contractors. Therefore, contractors were included in the exemption created by the word "activities" (Rec. 21, 22). (3) Construed any other way the exemption is meaningless since the activities are carried on by operating contractors (Rec. 22). (4) "Presumptively Congress does not pass or enact useless legislation. What was the purpose of immunizing 'The Commission, and the property, activities, and income of the Commission'? These are exempt from taxation under the doctrine of implied immunity" (Rec. 22). The federal courts in recent years have not been applying the doctrine of implied immunity from taxation "in various instances where the Government eventually bore the tax. It seems clear that Congress did not intend to leave this question to the courts but instead legislated on the question in such language as to cover all activities, etc., of the Government-owned instrumentalities" (Rec. 22). (5) "The word 'activity or activities' of course as applied to various things has various meanings but the ordinary accepted meaning of the term when applied to any particular thing is that it covers everything that the individual or the corporation does. It is so broad that it reaches a circumference of all the acts or doings of a corporation or an individual" (Rec. 23).

It is respectfully submitted that these points do not sustain the construction at which the State Court arrived.

It seems plain from reading the exemption that in speaking of activities of the Commission, Congress was not speaking of activities of the contractor, which must be an altogether different thing, if the contractor is an independent contractor and not an agent or servant.

The State Court construction is predicated on the idea that the discharge of the contract by the contractor is an activity of the Commission. It is respectfully submitted that this is not the case. This could only be true where the contractor and the Commission are one and the same in fact or in law.

Under the common law rule in Tennessee, and in other jurisdictions, activities engaged in by an independent contractor, under his contract, though for and on behalf of the other contracting party, are not to be considered the activities of the other party. Powell v. Construction Co., 88 Tenn. 692, 697; Master and Servant, 56 C. J. S., Sections 3 (2)-3 (8).

There is nothing in the Atomic Energy Act of 1946 which requires this confusion of these two separate entities. To the contrary, the Act makes it clear that Congress had in mind the Commission and, in the event the Commission saw fit to employ the same, the contractor, to carry out the act.

If, then, the Act contemplates two means by which the work is to be done, how can it be said that the exemption of one of these exempts the other? A construction which arrives at this end is not only broad, it is, and we say this respectfully, a loose construction. And while we agree that every act designed to accomplish a constitutional end should be construed so as to bring that about, broadly if need be, we do not believe this principle requires a loose construction such as has been arrived at.

As stated, two of the primary grounds relied on by the State Court to sustain its conclusion are: (1) Many contractors are employed by the Atomic Energy Commission so the exemption must apply to them; (2) a major part of the appropriation of the Atomic Energy Commission is paid the contractors, thus Congress must have intended to exempt expenditures by contractors.

It does not follow from these facts that Congress so intended.

The Act provides that the operations now carried on by contractors may be carried on by the Commission or contractors (Section 4). The exemption was written at a time when it was impossible for the Congress to know by which means the Commission would elect to carry out the program. How, then, can the fact that contractors are carrying out most of the operations and receiving the major part of the appropriations at this time have any value in determining the intent of Congress with respect to the extent of the exemption?

That there were contracts in existence at that time between contractors and the United States Army Engineers, and likely would be in the future, does not alter the situation since **Congress did not require the continuation of these contracts, as indispensable to carrying out the Atomic Energy Program under the Act.**

It seems far more reasonable to conclude that if Congress had intended the exemption to apply to contractors it would have said so. This is especially true in view of the care, time and attention given to the preparation of the Act (U. S. Code, Congressional Service, 79th Congress, Second Session, 1946, p. 1327).

Another ground of the State Court's majority opinion is as stated in (4) above, that the exemption is for the purpose of preserving intact the doctrine of constitutionally implied immunity from taxation. It is stated in the opinion

that in recent years the federal courts have not been applying the doctrine, and that Congress did not intend to leave this question to the courts, but legislated on it in the broadest language.

The opinion assumes that there exists a doctrine of constitutionally implied immunity from taxation which exempts contractors with governmental agencies, and that it was the intent of Congress to preserve this doctrine.

The doctrine of implied constitutional immunity is what this Court says it is. At the time Section 9 (b) was written, the opinions of this Court made it plain that the doctrine of constitutionally implied immunity from taxation would not exempt from nondiscriminatory excise taxation independent contractors working under contracts with a governmental agency. Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3; Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; James v. Dravo Contracting Co., 302 U. S. 132, 82 L. ed. 155.

If it was the intent of Congress to preserve the implied immunity doctrine as it existed at the time the exemption was written, it would necessarily follow that independent contractors are not included within the exemption.

If it had been the intention of Congress to write an exemption to the same extent as the constitutionally implied exemption, prior to the opinions of this Honorable Court in Alabama v. King & Boozer, 314 U. S. 1, 86, and Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; James v. Dravo Contracting Co., 302 U. S. 132, 82 L. ed. 155, it would have had to write into the exemption the statement that the exemption exempted contractors with it. Congress presumptively knew this and the fact that the exemption was not written this way is enough to show it was not intended that it be so construed.

The dictionary definition of the word "activities" resorted to in the majority state opinion does not sustain it.

The word "activities" is used in the exemption to define the extent of exemption. It does not relate to the object to whom the exemption is granted.

The exemption was obviously prepared with care. Precise language was employed to secure freedom from taxation of all the recognized objects thereof. Freedom from ad valorem, income and excise taxation of the Commission was assured by the exemption from taxation of its property, income and activities.

If the exemption was written as it was to cover the three main classifications of objects of taxation, then, the use of the word "activities" was not intended to exempt contractors.

If the classification, "activities", includes the contractor then, logically, the other classifications include the contractor.

We submit however that Congress had no intention to exempt either the property, the income or the activities of the contractor.

Where Congress has tied together all of the objects of taxation in one bundle and has said the Commission cannot be taxed with respect to these, a construction which unties the bundle and selects one of these objects of taxation and applies it to a different, independent, party, does, as we believe, violence to the congressional intent.

It is respectfully submitted that the exemption of activities of the Commission cannot be construed as exempting independent contractors with that Commission for so to do achieves by construction a result which Congress has refused to bring about by specific legislative enactment.

The policy of Congress in this matter was recognized and commented on in Standard Oil Co. v. Fontenot, 4 So. (2d) 634, as follows:

"The plaintiff and the intervenor assert that the authority for the execution of the contracts are two Acts of the 70th Congress, namely, Public Act 703, approved July 2, 1940, 54 Stat. 712; and Public Act 611, approved June 13, 1940, 54 Stat. 350. It appears that attempts were made to amend proposed legislation to provide for a specific exemption from State taxes for contractors under a 'cost-plus-a-fixed-fee' contract, and to legislate them into the status of an agency representing the sovereign nation. It was sought to amend Public Acts 43 (53 Stat. at L. 590-592) so as to provide that all contractors who entered into authorized contracts should be held to be agents of the United States for the purpose of such contracts. The Act was passed without the proposed amendment. Prior to the passage of Public Act 588 of the 76th Congress, 54 Stat. 265, the language therein, which would have made such contractors agents of the government and would have exempted them from all taxes—federal, state and local, was stricken therefrom in the House and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-7535, Amd't 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, pages 7646-7648. Therefore, when the War Department entered into the contracts in question, it was with full knowledge that Congress had refused to make such contractors agents or instrumentalities of the Government and that Congress had likewise refused to make available to such contractors a specific statutory exemption from State and local taxes" [4 So. (2d) 634].

Likewise, in State of Alabama v. King and Boozer (1941), 314 U. S. 1, 13, 86 L. ed. 3, 8, 62 S. Ct. 43, 140 A. L. R. 615, 620, reference is made to the fact that Congress has declined to pass legislation immunizing from state taxation contractors under cost-plus-contracts for the construction of governmental projects. Reference is made

in this latter case to "proposed Senate Amendment No. 120, to H. R. 8438, which became the Acts of June 11, 1940, 54 Stat. at L. 265, Chap. 313; Cong. Rec., 76th Cong., 3d Sess., Vol. 86, part 7, pp. 7518, 7519, 7527-7535, 7648."

In view of this policy of Congress to refuse to exempt contractors by the enactment of legislation which specifically defines who are contractors and what contractors are exempt, we respectfully submit that the term "activities" was not intended to exempt contractors.

The Special Congressional Committee on atomic energy to which bills for the control of atomic energy were referred reported back S. 1717, with recommendation that it pass. This recommendation was accepted and the bill did pass and become the Atomic Energy Act of 1946. The following is the only comment of the Special Congressional Committee on Section 9 of the Atomic Energy Act of 1946, including Section 9 (b):

> "Section 9, Property of the Commission.
>
> "The Commission is to take over all resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property" (p. 1334) (U. S. C. C. S. 79th Cong., 2d Session, 1946).

It will be noted that the only reference made by the Special Congressional Committee to the question of taxes is that "the Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property." There is nothing in the whole report to indicate that the Special Congressional Committee considered the exemption of the Commission from

taxation would exempt contractors with the Commission. To the contrary, the implication of the foregoing statement of the Committee is that the Commission understood that the exemption applied solely to the Commission, its properties, and its own operation of those properties.

It is difficult to conceive that the policy of permitting state taxation of independent contractors with the Federal Government could have been departed from without any comment thereon by the Committee. The petitioner believes that if the Special Congressional Committee which adopted the bill that became the Atomic Energy Act of 1946 had intended to exempt independent contractors with this instrumentality of the Government, the report of the Special Congressional Committee would have contained some reference to this fact and some explanation. Especially is this true when the Special Congressional Committee was careful to state that it was the intent of the Committee to undertake to reconcile as far as possible the governmental monopoly created in the field of nuclear energy with our traditional free enterprise system (Senate Report No. 1211, April 19, 1946, U. S. C. Congressional Service, 79th Congress, 2nd Session 1946).

The majority State Court construction cannot be sustained on the ground that nuclear energy has been declared to be a governmental monopoly and the exemption of independent contractors with the Commission is required on this account. The making of war, the preparation therefor, and acquisition of materials for this purpose have always been a governmental monopoly. Yet the Congress has refused to exempt independent contractors in the war effort and this Court has declined to find that the exercise of this monopolistic right so dislocates our traditional free enterprise system as to require that the operations of independent contractors engaged in producing war material be considered as governmental

agencies (Powell et al. v. U. S. Cartridge Co., 339 U. S. 497, 70 Supreme Court 755).

This congressional policy is predicated on the proposition that it would be unreasonable and unfair and to a great extent destructive of the balance undertaken to be preserved with respect to the powers of the Union and powers of the states to exempt those employed by the Federal Government from nondiscriminatory state taxation. The Congress has by law taxed the contractors and employees of every State of the Union and has recognized, as have the courts, that the states should be permitted to tax those independent contractors and employees with the Federal Government where the extent and manner of the taxation does not constitute any hindrance of the sort which Congress deems should be removed by the exercise of the constitutional power granted in Article 1, Sec. 8, Clause 18; Article 4, Sec. 3, Clause 2, of the Constitution of the United States (Metcalf & Eddy v. Mitchell, 269 U. S. 514).

This is a fair and reasonable policy and should be departed from only on the strongest evidence that Congress intended to depart from it (Smith v. Davis, 323 U. S. 111).

That Congress did not so intend is shown, further, by the provision in Section 9 (b) of the Atomic Energy Act authorizing the Atomic Energy Commission to make payments to state and local governments in lieu of property taxes. It is difficult to reconcile this congressional concern, that state and local governments suffer no property tax loss on account of the operations of the Commission, with the construction placed on the Act by the State Court which deprives the state and local governments of many times as much tax money.

It is customary to spell out the exemption to be enjoyed by the Governmental instrumentalities, but this exemp-

tion, as determined to exist by the State Court opinion, goes far beyond the exemptions provided for other federal instrumentalities.

This is another reason why such a construction should be rejected. There is no reason to believe that Congress intended to confer on this governmental instrumentality any greater degree of exemption than that conferred on other governmental instrumentalities.

It cannot be said that on account of the cost of the nuclear energy program the Congress intended to grant a broader exemption to the Atomic Energy Commission than it has granted to other governmental agencies and corporations. For, the Congress declined to exempt war contractors, whose taxation by the States of the Union must have cost the United States Government, indirectly, many more millions of dollars than state taxation of independent contractors with the Atomic Energy Commission could ever cost. Additionally, the Oak Ridge, the Los Alamos and the Hanniford projects had already been built, without any exemption of contractors, at the time of the enactment of the Atomic Energy Act of 1946.

Reference to the legislative history of the Atomic Energy Act reveals that two bills were prepared prior to the adoption of the present act. These were (1) May-Johnson Bill, which was House Bill, H. R. 4280, H. R. 4566, 79th Cong., 1st Session, and (2) the McMahon Bill, which was Senate Bill 1717, 79th Cong., 1st Session. Under the House Bill provision was made for the manufacture of fissionable material, (1) by the Commission itself, (2) by corporations created by the Commission, and (3) by private contractors. The exemption, contained in the House Bill, exempted the (1) Commission and (2) the corporations created by the Commission. The exemption provided in the House Bill did not exempt contractors. This House Bill was prepared by the House Committee

after consideration of the problem of manufacture and control of fissionable material. And, the fact that it did not contain, in its completed form, an exemption of contractors or any reference thereto is strong evidence that the House Committee never intended to recommend for passage a bill which would exempt independent contractors.

The Senate Committee took over many of the provisions of the May-Johnson Bill in writing the bill which finally became the law, but that Committee never inserted any express exemption of private contractors.

One of the main arguments of the intervenor and respondents, adopted by the majority opinion, is that unless the word "activities" includes contractors the Congress has enacted useless legislation, for the activities of the Atomic Energy Commission were already exempt.

This argument cannot stand when (1) the language of the exemption is considered and (2) when the congressional practice of exempting commissions and corporations by specific statute is considered.

The properties of the Commission, being federally owned properties, were exempt under the constitutionally implied exemption, yet Congress exempted the properties of the Commission; likewise, the income of the Commission was exempt, yet Congress exempted its "income." Why is it necessary then to conclude that Congress intended to include contractors by use of the word "activities" when so to do takes the word out of context and causes the exemption to apply to non-federal and non-governmental objects contrary to the other provisions of the exemption?

If it is necessary to construe the word "activities" as applying to contractors in order to avoid convicting Congress of having done a futile thing in enacting the exemption as it did, then, of course, it is necessary to construe the words "property" or "income" as applying to other objects than the Commission.

For some time it has been the practice for Congress to spell out by statute the exemption from taxation conferred on Federal commissions, Federal corporations and other governmental agencies which it created. The fact that these commissions and agencies may have already been exempt by the implication of the United States Constitution has never, before this, been considered any valid reason for extending or limiting the exemption beyond the plain requirements of the language thereof.

With respect to many of the governmental agencies, commissions and corporations created by Congress, Congress has defined the extent of the exemption in about these words: "The corporation, its property, franchise and income are hereby expressly exempted from taxation in any manner or form by any state, county or municipality or subdivision or district thereof." (See U. S. C. A., Title 16, 831-1 TVA exemption; U. S. C. A. 7, Section 1014, Farmers' Home Corporation; U. S. C. A. 12, Section 1768—Federal Credit Unions.) It is plain that in the exemption of the "franchises" of such commission or corporation the Congress intended to exempt the activities of the governmental agency in carrying out the purposes for which it was created. It is respectfully insisted that in exempting the activities of the Atomic Energy Commission the Congress intended to exempt no more than it would have exempted if it had exempted the "franchise." The obvious congressional intent was to exempt the Commission from either excise or franchise taxation on account of its exercise of the privilege and obligations provided for and imposed upon it by the Atomic Energy Act.

The chancellor was of opinion that Section 9 (b) of the Atomic Energy Act does not exempt contractors from taxation for the following reasons:

> "A careful study of the language contained in this Section reveals that the Commission is directed to take into consideration the burdens **its activities and the**

activities of its agents might cast upon the State and local governments when considering the amount of tax to be paid to those authorities in lieu of property taxes but in the last sentence quoted above, which grants exemption from taxation, it is only **the Commission, its property, its activities and its income which are 'expressly exempt from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.'**, It results that the failure of the Congress to use the word 'agents' in the last sentence wherein the Commission was exempt from taxation indicates clearly that the Congress did not intend that the Commission's agents or those with whom it dealt should also be exempt from taxation.

"'The Congress has upon numerous occasions expressly refused to exempt contractors engaged in work for the Government under cost-plus-fixed-fee contracts from the burdens of taxing statutes. This point was commented upon in Alabama v. King & Boozer, supra, and also in Standard Oil Co. v. Fontenot, 4 So. (2d) 637.

"It is well established that a fixed policy of the Government will not be changed by presumption. The intention to bring about a change of an established policy must be expressed in apt words and not left to conjecture."

The minority opinion of the Supreme Court of Tennessee, that Section 9 (b) does not exempt contractors from taxation, was based in part on the following:

"I can conceive of no theory or premise upon which to base a conclusion that the appellants come within the four corners of the above statute if they are properly classified as independent contractors. It is not only conceivable, but quite consistent with reason, that agents of the Commission could rightfully claim exemption from taxation on the ground that whatever

they do, or contract to do, must be adjudged as an activity of the Commission. But even where contractors claim to be agents the Congress should, to avoid doubt and confusions, specifically declare an exemption. In a legal sense the appellants are not agents of the Atomic Commission."

It is anticipated that respondents will contend that the Supreme Court of Tennessee has not passed on their insistence that the sales and use transactions involved in these cases are not taxable because (1) the purchases and use of tangible personal property are by the Federal Government, and (2) title to the tangible personal property purchased and used by the contractors vests in the Government on delivery.

Petitioner insists that these issues have been passed on by the State Courts, expressly and by implication. And, being issues of fact, are not subject to further review under this petition which is directed at the federal question.

Should this Court be of opinion that further inquiry into these questions is warranted, it is respectfully submitted that these issues should be determined in favor of the petitioner.

The record establishes that purchases and use of tangible personal property are by the respondent contractor, and not the Atomic Energy Commission, and the Supreme Court of Tennessee so held (Rec. 14).

1. The original bill avers that the contractor makes the purchases of tangible personal property for use under the contract (Rec. 33).

2. The answers admit these allegations of fact (Rec. 41).

3. By contract W-7401-eng-115, Exhibit 1, as amended from time to time, the Roane-Anderson Company contracted as follows:

Article I—Statement of Work.

"1. The Contractor shall manage, operate and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, utilities, roads, services, properties and appurtenances, as directed or authorized by the Contracting Officer; provided, however, that the work to be performed hereunder shall not be deemed to include the management, operation or maintenance of any processing plant. Work within the restricted plant area or areas may be performed upon the direction or authorization of the Contracting Officer."

"2. By way of illustration, but not limitation, the Contractor shall perform the following services:

"(a) The management, operation, maintenance and repair of residences, hotels, restaurants, cafeterias, dormitories, hutments, trailers, temporary housing facilities, laundries, all other buildings, structures, facilities, utilities, properties and appurtenances, whether similar or dissimilar in nature, auto pool, roads, ways, streets and sidewalks, drainage ditches, garbage disposal, sewage disposal plant and equipment, railroad tracks and appurtenant equipment, transmission lines and appurtenant equipment, water system, heating plants, plumbing and electrical equipment."

4. Said contract has been characterized by Carroll L. Wilson, then General Manager, Atomic Energy Commission, in a statement to the Congressional Committee on Atomic Energy on Thursday, February 17, 1949, as follows:

"The joint committee has requested that a part of this afternoon's hearing be devoted to a discussion of

the Commission's contract procedures and practices. The Commission welcomes this opportunity for such a discussion. As you know, we have from time to time, in our reports to the Congress as well as in other published statements, referred to the central rule which contractors occupy in the atomic energy program. We believe that it is important for the public generally and for American business to know and to understand the policies which we are following.

"It will be helpful, I think, to begin by stating in somewhat general terms the Commission's views on the manner in which a major part of its business should be conducted.

"The Atomic Energy Act of 1946 left it to the Commission to determine, in the light of experience and prevailing circumstances in each case, whether its installations should be directly operated by the Commission or whether they should be operated by private contractors or organizations in accordance with the practice which had been initiated by the Manhattan District.

"The Commission has been of the view—and we believe this view is amply supported by our two years of experience since we succeeded to the responsibility of the atomic energy enterprise—that we should develop as fully as possible the method of operating through contractual relations with private organizations. We have recognized that the high relative significance of weapon production and the necessary secrecy of large parts of the atomic energy program involve the danger that only limited scientific, technical and managerial resource will be available to this most urgent new atomic enterprise. Such handicaps must be minimized and overcome if this country's rapid progress in the field of atomic energy is to be assured. Accordingly, the Commission has looked to the basic policy of contractor operation as a means of develop-

ing wide and alert participation in the program by a growing number of private organizations, both academic and industrial.

"By pursuing a basic policy of obtaining contractor-operators the Commission has been able to draw upon the technical and administrative talents of a broad sector of the American economy. Operation of our plants and laboratories through established independent contractors not only gives to the atomic energy program substantial benefits from accumulated experience and established facilities; it also enlists the interest and the support of industry and universities for future private development. It has been our conviction that if atomic energy is to become a generic part of the American scene it should have its roots deep in the institutions which are so productive a part of American progress in science and technology. The identities of the contractor-operators at the Commission's major facilities are, of course, well known to the members of the joint committee. At Oak Ridge the production and the laboratory facilities are operated by the Carbide & Chemicals Corp., while the Roane-Anderson Co. is the principal contractor for town operations" (p. 47 of "Los Alamos Retrocession Bill and Aec Contract Policy—Hearings Before the Joint Committee on Atomic Energy Congress of the United States, Eighty-first Congress, First Session on Los Alamos Retrocession Bill and Aec Contract Policy, February 17, 21 and 24, 1949)."

5. Article 1, Section 3, and Article VIII, Section 3 (c), provide as follows:

"3. In the operation of the facilities under this contract, and in the procurement of any and all such supplies, materials and equipment necessary to the performance of the work hereunder, the Contractor shall act as agent for the United States of America, it be-

ing understood and agreed, however, that all personnel and labor shall be and remain for all purposes the employees of the Contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under the sole supervision and direction of the Contractor, except as otherwise expressly provided in this contract or as otherwise mutually agreed in writing between the Contractor and the Contracting Officer."

Article VIII, Section 3 (c):

6. "(c) Reduce to writing, unless this provision is waived in writing by the Contracting Officer, every contract in excess of Two Thousand Five Hundred Dollars ($2,500.00) made by it for services, materials, supplies, tools, machinery and equipment, or for the use thereof in connection with the work under this contract. Make all such contracts in its name as agent for the United States of America. No purchase in excess of Two Thousand Five Hundred Dollars ($2,500.00) shall be made or placed without the prior approval of the Contracting Officer."

These provisions of the contract whereby, first, the United States Army Engineers, and, second, the Atomic Energy Commission, themselves merely agencies of the Federal Government, undertake to constitute Roane-Anderson Company an agent of the United States Government, were placed in the contract for the purpose of avoiding state taxes. On page 6 of Exhibit 36 in the Roane-Anderson Company case, the same being a copy of the negotiations between the United States Army Engineers and Roane-Anderson Company, leading up to the integration of Contract No. W-7401-eng-115, the following statement appears:

"Operation, Supervision and Maintenance, as an agent for the Government.

"(Note) The agency provision will be to the benefit of the Government as it will probably make it possible for the Government to avoid the expense of paying for certain taxes, permits, licenses and fees that might otherwise be required and secured and paid for by the contractor as a reimbursable item of cost by the Government."

Roane-Anderson Company is the agent of the United States Government only in the sense that it is the means or medium through which United States Government secures the execution of certain work which it is not prepared to execute for itself. Roane-Anderson is not an agency or instrumentality of the Federal Government.

8. The principal witness introduced by all respondents, Charles Vanden Bulck, Special Assistant to the Manager of Oak Ridge operations, an employee of the Atomic Energy Commission and the highest ranking employee of the Commission to testify, said:

"Q. So then the situation resolves itself down to this: If the contractor says he needs certain materials or supplies, he orders the materials and supplies, and they are delivered to him, and then he proceeds to use them in the manufacture of a certain designated amount of material under the contract?

A. That's right, with the exception of certain designated material which we must furnish him that he cannot obtain anywhere else. We attempt to have him buy everything he needs to operate the plant."

The respondent assigned as error, in the Supreme Court of Tennessee, the action of the chancellor in holding as above indicated. The Supreme Court of Tennessee did not sustain this assignment but held that the transactions were (1) not exempt because of implied immunity from taxation, but (2) were exempt because of the statutory exemption.

Assuming that purchases by the Atomic Energy Commission would be exempt from sales taxation, the holding of the Supreme Court of Tennessee, by necessary implication, sustains the holding of the chancellor. For this reason petitioner insists that all of these issues have been passed on by the State Courts either expressly or by necessary implication.

It is not conceded, however, that the taxation of a Tennessee vendor for the privilege of engaging in the business of making retail sales to the Atomic Energy Commission would constitute taxation of the Federal Government and be unconstitutional, even though the cost of the tax be added by law to the sales price of the article.

If the tax in question is a privilege tax resting solely on the vendor then the vendee cannot complain, nor can he maintain a suit as a taxpayer to recover back the part of the purchase price which may be equal to the tax paid by the vendor for the privilege of selling the particular article.

Section 3 of Chap. 3 of the Public Acts of 1947, the Tennessee Retailers Sales Tax Act, provides in part:

> "That it is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege, a tax is levied as follows:"

The Supreme Court of Tennessee in construing this provision of the Act, and the Act as a whole, has held that the tax in question is a privilege tax on a vendor for the privilege of engaging in the business of selling tangible

personal property at retail. We quote from the opinion of the Supreme Court of Tennessee in the case of Hooten v. Carson et al., supra:

> "The main contention of appellant, challenging the validity of the statute, is that the tax is upon the consumer-buyer, and that this is not a privilege that may be taxed. Under Section 5 of the Act the tax is required to be collected from the consumer; that the amount must be added to the retail price of the article, etc. No retail dealer is permitted to advertise that the tax will not be collected. While the State concedes that the purchaser ultimately pays the tax; the Act expressly states that it is a privilege tax levied upon the merchant. The State can only enforce its claim for taxes solely against the merchant. All penalties for non-payment run against the retailer. It is therefore earnestly insisted that 'the tax in question is a tax upon the retail seller.'"
>
> "We are convinced from an examination of a number of leading tax cases that this contention is correct. • • • There is a strong and very just reason why the Legislature made it mandatory upon the seller to collect the tax from the purchaser. This express direction is found in many of the retail sales tax statutes. The courts, in discussing this provision, have held that it is a matter of reasonable regulation of trade practices."
>
> Hooten v. Carson, 186 Tenn. 287.

The decision in Hooten v. Carson, supra, was based in part on the opinion of the Superior Court of California in the case of Western Lithograph Co. v. State Board of Equalization, 78 P. 2d 731, in which that court held that a sales tax on the vendor of tangible personal property measured by gross retail sales, which is the basis of the Tennessee tax (Sec. 3, Chapter 3, Public Acts of Tennessee for 1947), would not violate the immunity from taxation of

a national bank which had purchased certain tangible personal property, to the price of which the tax had been added in keeping with statutory requirement.

The holding is the Hooten case is affirmed in the majority opinion in these consolidated cases (R. 7).

The cost of the tax is no greater if it is added because of a statute requirement than when added because of economic necessity. The cost of excise taxation added on this latter account is borne by the Federal Government in every purchase it makes.

This contention is sustained by the case of Brodhead v. Brothwick, 174 Fed. 2d 21, in which certiorari was denied by this Court on October 17, 1949. In that case appellant, who had sold goods to Army Post Exchanges and Naval Ships' Service Stores of the United States, Federal instrumentalities (Standard Oil Co. of California v. Johnson, 316 U. S. 481), contended, among other things, that an excise tax equal to 1½% of the gross proceeds of sales to such vendors violated the Constitution of the United States. The Ninth Circuit Court of Appeals held that such a non-discriminatory general privilege tax levied upon the vendor of materials and supplies to an Army Post Exchange or Naval Ships' Service Stores would not violate the Constitution or deprive the Government of any immunity to which it was constitutionally entitled.

Since the incidence of the Tennessee Sales Tax is on the vendor, **and the addition of the tax to the sales price is required only as far as practicable** [Section 5 (b), Chap. 3, Public Acts of the General Assembly of Tennessee for 1947], it is respectfully submitted that no constitutional immunity from taxation of the Federal Government would be violated even if this Court were to conclude that the sales transactions involved in these cases were between the Tennessee vendors and the Federal Government.

The contention of respondents that the sales and use transactions are not taxable because title to the tangible personal property purchased and used vests in the Government on delivery, is untenable. The same contention was made in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, and Curry V. United States, 314 U. S. 14, 86 L. ed. 9.

The use tax is levied at the rate of 2% of the cost price on the use of tangible personal property. [Section 3; Section 3 (b) of Chap. 3, Public Acts of the General Assembly of Tennessee for 1947]. Liability for the tax does not turn on the fact of the contract of purchase of tangible personal property but upon the use thereof. "Use" is defined in the Sales Tax Act:

> "(h) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."
>
> [Sec. 2 (h), Chap. 3, Public Acts of General Assembly of Tennessee for 1947).

Application by an independent contractor of tangible personal property to the discharge of a contract is the exercise of such power over tangible personal property as is incident to ownership thereof. There is no denying the respondent contractor "used" the tangible personal property in question in this case in discharging its contract. Since the independent contractor enjoys no exemption, either express or implied, it is liable for the use tax. That ownership of the property "used" is not material is proved by the case where the independent contractor brings tangible personal property into the State, belonging to a nonresident, and applies it to the contract.

The concurring opinion filed in the Supreme Court of Tennessee finds that the respondent contractor is a purchasing agent for the Atomic Energy Commission. That

the exemption of the Atomic Energy Commission from taxation by Section 9 (b) exempts the purchases made by such agents and on this account the same are not taxable.

This finding is contrary to the conclusion reached by the other four members of the court that the respondents are independent contractors, to whom the vendors look for payment (Rec. 14).

The finding is apparently based on the fact that title to the property vests in the United States Government on delivery and inspection. But this fact, though present in the cases of **Alabama v. King & Boozer**, supra, and **Curry v. United States**, supra, was held by this court not to exempt from taxation.

This concurring opinion gives consideration only to the sales tax issue presented by the consolidated cases. The issue of use tax liability cannot be resolved on the basis of the agency of the contractors in the purchase of the materials in question. This would only result in title to said goods vesting in the Government prior to use by the contractor. This condition existed in the case of **Curry v. United States**, supra, in spite of which it was held that the contractor was liable to pay a use tax for his use of the tangible personal property in discharging his contract.

But even the concurring opinion agrees that there would be tax liability on the basis of the contract and the record except for Section 9 (b) of the Atomic Energy Act. Apparently the Supreme Court of Tennessee, without dissent, or without distinguishing concurring opinion, would have held that the sales and use taxes could be collected from respondent except for Section 9 (b) of the Atomic Energy Act.

One of the major questions presented by these consolidated cases is: Can a governmental instrumentality which has been granted a specific statutory exemption enlarge that exemption by the terms and conditions of the contracts of employment of independent contractors?

The Atomic Energy Act authorizes the Commission to perform all of the functions required by the Act. It exempts the Commission from taxation with respect to these things. It authorizes the Commission to employ contractors to perform certain of these functions. The Congress did not exempt the contractor. Can the Atomic Energy Commission supplement this congressional exemption by resorting to technical artificialities of contract law?

Petitioner respectfully submits that this cannot be done. The will of Congress which must be paramount cannot be thwarted in any such manner.

This must be true with respect to an implied exemption as well as a statutory exemption since the opinions of this Court in **Graves v. New York**, 306 U. S. 466, 83 L. ed. 927; **James v. Dravo Contracting Co.**, 302 U. S. 134, 82 L. ed. 155; **Alabama v. King & Boozer**, 314 U. S. 1, 86 L. ed. 3; **Curry v. U. S.**, 314 U. S. 14, 86 L. ed. 9; **Penn. Dairies v. Milk Control Com.**, 318 U. S. 261, 87 L. ed. 748. Congress has been on notice since these opinions that it lies within its power to exempt from taxation both the independent contractor with the federal agency and the purchase and use of tangible personal property by such contractor. Congress has also been on notice since these opinions that the implied exemption does not apply to independent contractors and purchases and use of tangible personal property by such contractors. With this knowledge Congress has affirmatively declined to legislate on the matter, thereby indicating that it is the congressional policy that nondiscriminatory sales and use taxation of independent contractors by the states is unobjectionable. **Mayo v. United States**, 319 U. S. 441.

Under these conditions an administrative commission cannot assume the legislative role and supplement this congressional policy by contract provisions designed to bring about a contrary result.

It cannot be said that it is beyond the power of Congress, by the establishment of such a policy, to prevent an administrative agency from resorting to these means to secure an implied exemption for its contractors. In the establishment of such a policy Congress is acting under the authority of the same constitutional provisions which permit it to grant an express exemption from taxation to federal agencies when it feels that such is needed.

If, however, consideration is to be given to principles of contract law, in addition to congressional policy in determining the question of exemption or no exemption, and reference is to be made to contract provisions, then, petitioner invokes the rule that delegated immunity cannot be delegated without express authority. **Penn Dairies v. Milk Control Com.**, 318 U. S. 261, 87 L. ed. 748; **Reconstruction Finance Corp. v. J. G. Menihan Corp.**, 312 U. S. 81, 61 S. Ct. 485, 85 L. ed. 595, and cases cited; **Colorado Nat. Bank v. Bedford**, 310 U. S. 41, 53, 60 S. Ct. 800, 805, 84 L. ed. 1067, and cases cited. Under this rule and the reasoning of this Court in these cases, both the express and the implied immunity from taxation would cut off at the Atomic Energy Commission and the Commission could not confer either upon contractors with it.

In conclusion, it is respectfully submitted that this petition presents an important Federal question, the answer to which is to be made, finally, by this Honorable Court. For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A."

Atomic Energy Act of 1946, Section 9 (b).

"Payments to State and local governments in lieu of taxes; exemption from taxation.

"(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. Aug. 1, 1946, c. 724, Sec. 9, 60 Stat. 765."